In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1090

PAUL JOSEPH McMENAMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 403 F. 2d 969.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1968. A petition for rehearing was denied on January 28, 1969. The petition for a writ of certiorari was filed on February 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence sustained petitioner's conviction of using interstate telephone and telegraph

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services to facilitate an unlawful gambling activity.

2. Whether it was proper to include petitioner's alias in the indictment.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Kentucky of using telephone service between Hot Springs, Arkansas, and Louisville, Kentucky, with intent to facilitate the carrying on of an unlawful activity, *viz.*, a gambling enterprise in violation of the laws of Kentucky (Count 1), and of using an interstate telegraph facility with intent to distribute the proceeds of such unlawful activity (Count 2), both in violation of 18 U.S.C. 1952.[1] He was sentenced to

[1] 18 U.S.C. 1952 provides in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, * * * in violation of the laws of the State in which they are committed * * *.

* * * * *

concurrent terms of two years imprisonment (R. 1–2).[2] The court of appeals affirmed (Pet. App. A).

In early 1964, Harold Baines, a tavern owner in Louisville, Kentucky, received a telephone call from Hot Springs, Arkansas, from a person who identified himself as "Doc Gibson." Gibson stated that he was a veterinarian and claimed that he had "a way with making horses win". He offered to give tips on Arkansas races to Baines, who would then bet on the races and split his winnings with Gibson. From time to time, Baines received further calls at his tavern from Gibson in Hot Springs, in which Gibson predicted a number of winning horses (Tr. 19–22, 30).

On February 13, 1965, Baines received a telephone call from Gibson in Hot Springs advising him to bet on a particular horse.[3] Baines bet on the horse through a local bookmaker; the horse won and, pursuant to Gibson's instructions, Baines sent $350 by Western Union money order to P. J. McMenama in Little Rock, Arkansas (Tr. 22–25, 30–31, 45, 47–51, 52–54). The money order was cashed by petitioner (Tr. 89).[4]

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[2] "R." refers to the record filed in this Court. "Tr." refers to the transcript of the trial beginning October 20, 1967, marked by petitioner as "C". The transcript marked "B" by petitioner is of an earlier trial under the same indictment, which ended in a hung jury.

[3] An official of the telephone company corroborated Baines' testimony as to this and other calls (Tr. 58–67).

[4] Petitioner admitted this at trial, explaining that he did it as a favor for Doc Gibson, an elderly friend, who had since died. He denied ever meeting Baines or talking with him on the telephone.

On subsequent bets pursuant to tips received by telephone from Gibson, Baines lost approximately $4,500 (Tr. 25). Thereafter, Baines met "Gibson" in a Louisville hotel and recognized his voice as that of the man who had proposed the betting scheme and had given betting instructions over the telephone. At trial, Baines identified petitioner as the man he had met in the hotel (Tr. 26–29).

ARGUMENT

1. Contrary to petitioner's challenge to the sufficiency of the government's proof, it is immaterial whether petitioner himself violated the Kentucky statute prohibiting off-track betting,[5] *McIntosh* v. *United States*, 385 F. 2d 274, 277 (C.A. 8), and cases there cited. The offense charged under count 1 was the use of interstate telephone services with intent to promote or facilitate an activity prohibited under State law. The jury could properly find that petitioner, using the false name of "Doc Gibson," made the interstate calls with the intent that Baines place the recommended bets with a bookmaker, as he did, in violation of Kentucky law. The evidence also

[5] Each of the two counts of the indictment charged that petitioner used the facilities of interstate commerce to promote gambling activity in violation of Kentucky law in two respects: "activity" as a "common gambler" (K.R.S. 436.210) and (2) off-track betting on race horses (K.R.S. 436.490) (see Pet. 4–6). Since the proof showed that petitioner used interstate facilities to promote the unlawful activity of off-track betting, and to distribute the proceeds of that activity, the court of appeals correctly concluded that it was unnecessary to pass upon the applicability of the "common gambler" statute to this case (Pet. App. A, 22).

justified the conclusion that petitioner instructed Baines to make his remittance by using interstate telegraph facilities, as charged in Count 2. Petitioner's conduct thus fell within the proscriptions of the Travel Act; it was not necessary for the government to establish that it was tied to an organized crime operation. See *United States* v. *Barnes,* 383 F. 2d 287, 289 n. 2 (C.A. 6), certiorari denied, 389 U.S. 1040.

2. Petitioner did not complain in the district court of his identification in the indictment as "Paul Joseph McMenama, also known as Doc Gibson." Emphasizing that petitioner had been convicted at a second trial under the same indictment, the court of appeals properly held that no issue was preserved for appellate review. In all events, since the alias was proved and was an integral part of the offense, petitioner has no basis for his contention. *United States* v. *Solowitz,* 99 F. 2d 714, 715 (C.A. 7).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969